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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Sandra Jauregui,

No. CV-23-00729-PHX-JJT

10 Plaintiff,

ORDER

11 v.

12 Daimler Truck North America LLC, *et al.*,

13 Defendants.

14

15 At issue is Defendant Daimler Truck North America LLC's Motion for Summary
16 Judgment (Doc. 86, MSJ), to which Plaintiff Sandra Jauregui filed a Response (Doc. 94,
17 MSJ Response) and Defendant filed a Reply (Doc. 100). Each party supports its position
18 with a statement of facts (Doc. 87; Doc. 96). Defendant, with the Court's leave, also filed
19 a separate objection to Plaintiff's statement of facts (Doc. 101). The MSJ depends in part
20 upon certain admissions that resulted from Plaintiff's failure to timely respond to a set of
21 requests for admissions. Plaintiff has filed a Motion to Withdraw Admissions (Doc. 104,
22 Mot. to Withdraw), to which Defendant has filed a Response (Doc. 105, Admissions
23 Response) and Plaintiff has filed a Reply (Doc. 106, Admissions Reply). The Court finds
24 these matters appropriate for resolution without oral argument. *See* LRCiv 7.2(f). For the
25 reasons set forth below, the Court grants both Plaintiff's Motion to Withdraw Admissions
26 and Defendant's Motion for Summary Judgment.

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1 **I. Background**

2 The material facts of this case are undisputed. On May 20, 2022, Jose Luis Jauregui
3 Soto died in a tragic trucking accident on the I-17 in Phoenix, Maricopa County, Arizona.
4 Mr. Soto was a driver for Shamrock Farms, and on the morning of May 20 he was driving
5 north on the I-17 carrying Shamrock cargo in a 2022 Peterbilt Conventional 579 tractor-
6 trailer designed and manufactured by Paccar, Inc. Also driving north on the I-17 on the
7 morning of May 20 was Ramon Vizcarra, another driver for Shamrock. Mr. Vizcarra was
8 driving a 2018 Freightliner Cascadia tractor-trailer designed and manufactured by
9 Defendant. Both Mr. Soto and Mr. Vizcarra had departed from the same Shamrock facility,
10 with Mr. Vizcarra a few minutes ahead of Mr. Soto.

11 While on the I-17, Mr. Vizcarra's truck inexplicably began to lose momentum.
12 Although no component within the truck actually shut down, Mr. Vizcarra claims that some
13 sort of a disconnect manifested between the engine and the wheels such that his depression
14 of the acceleration pedal had no effect on the truck's speed, even though he could hear the
15 engine rev as normal. There were no warning lights or other cautionary indicators, and
16 Mr. Vizcarra did not perceive any odd sounds or other unusual indicia. His truck was
17 simply slowing down, and he did not know why. Being apparently unable to control his
18 vehicle's speed, Mr. Vizcarra attempted to navigate to the side of the road, but he was
19 unable to do so before the vehicle slowed to a stop. Thus, Mr. Vizcarra found himself at a
20 complete standstill in the number two traffic lane of an active interstate highway. Shortly
21 thereafter, Mr. Soto crashed into Mr. Vizcarra's stalled truck. He died in the collision.

22 Immediately following the accident, a Shamrock driver restarted Mr. Vizcarra's
23 truck and was able to drive it without any issues. Several other individuals, including
24 Shamrock mechanics and third-party technicians, also examined the truck and found
25 nothing amiss. Nothing in the truck's service history provides any indication of what
26 occurred, and there have been no reports of analogous incidents from other drivers of other
27 trucks. Mr. Vizcarra's truck was returned to service without the need for repairs. Since the
28 accident, the truck has been driven approximately 80,000 miles, and there have been no

1 anomalous issues of the kind reported by Mr. Vizcarra. Prior to the incident, the truck had
2 been driven approximately 121,000 miles, also without any issue resembling that described
3 by Mr. Vizcarra. In short, nobody has a clear idea of why Mr. Vizcarra's truck lost motive
4 power on the morning of May 20.

5 Plaintiff is Mr. Soto's widow. She initiated this diversity action on her own behalf
6 and on behalf of Mr. Soto's other statutory beneficiaries, including his parents and his five
7 children. Plaintiff has brought claims against Defendant and Paccar, who designed and
8 manufactured Mr. Vizcarra's and Mr. Soto's vehicles, respectively, as well as Bendix
9 Commercial Vehicle Systems LLC, the designer and manufacturer of a collision avoidance
10 and mitigation system installed on Mr. Soto's truck. The instant MSJ concerns only the
11 claims against Defendant, which arise out of its design and manufacture of Mr. Vizcarra's
12 Freightliner truck. The claims against Paccar and Bendix are not at issue here. Plaintiff
13 asserts claims against Defendant for strict products liability, negligence, and wrongful
14 death. Although Plaintiff initially sought punitive damages, she later stipulated to strike
15 that prayer for relief. (Doc. 26.)

16 On August 24, 2023, the Court issued a Rule 16 scheduling order. (Doc. 37.)
17 Pursuant to that order, fact discovery closed on May 20, 2024. Approximately six weeks
18 prior to the close of fact discovery, on April 4, 2024, Defendant propounded fifteen
19 requests for admissions. Under Federal Rule of Civil Procedure 36(a)(3), Plaintiff had
20 thirty days to respond. Plaintiff failed to timely respond. On June 11, 2024, well over a
21 month after the deadline to respond had passed, Defendant notified Plaintiff that the
22 requests for admissions were still outstanding. Plaintiff served a response to the requests
23 the next day. Under Rule 36(a)(3), a matter is admitted if not denied or objected to, but the
24 Court may permit a party to withdraw or amend an admission under Rule 36(b) "if it would
25 promote the presentation of the merits of the action and if the court is not persuaded that it
26 would prejudice the requesting party in maintaining or defending the action on the merits."
27 Plaintiff has filed a Motion to Withdraw Admissions. Because Defendant's MSJ rests in
28 part upon the admissions resulting from Plaintiff's failure to timely respond to Defendant's

1 requests, the Court must resolve the Motion to Withdraw Admissions before turning to the
 2 merits of the MSJ.

3 **II. Motion to Withdraw Admissions**

4 Under Rule 36(a)(3), a non-response to a request for admission is a deemed
 5 admission. Deemed admissions are “conclusively established” unless the Court permits
 6 withdrawal or amendment of the admissions. Fed. R. Civ. P. 36(b). District courts possess
 7 discretion to allow withdrawal if two elements are met: (1) the withdrawal must “promote
 8 the presentation of the merits of the action” and (2) the withdrawal must not “prejudice the
 9 requesting party in maintaining or defending the action on the merits.” *Id.* The withdrawing
 10 party bears the burden of showing that withdrawal promotes adjudication on the merits,
 11 but the requesting party bears the burden of persuading the court that prejudice exists. *See*
 12 *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007). If both elements of Rule 36(b)
 13 are satisfied, a district court may permit withdrawal or amendment, but it is not required to
 14 do so.

15 Plaintiff argues that the criteria of Rule 36(b) are satisfied here and that the Court
 16 should therefore exercise its discretion to allow withdrawal of her deemed admissions.¹
 17 Defendant contends (1) that the elements are not met and (2) that the Court should
 18 discretionarily deny withdrawal in any event. The Court will address those arguments in
 19 turn. However, Defendant also presents a preliminary argument that Plaintiff’s Motion is
 20 procedurally improper and should therefore be denied summarily. (Admissions Response
 21 at 2.) Defendant frames Plaintiff’s Motion as a “discovery motion.” As set forth in the Rule
 22 16 scheduling order, the Court prohibits the filing of discovery motions and instead
 23 requires compliance with an alternative procedure for the resolution of discovery disputes.
 24 (Doc. 37 at 3.) Moreover, “[t]he Court will not entertain discovery disputes after the close
 25 of discovery absent truly extraordinary circumstances.” (Doc. 37 at 3.) Plaintiff did not
 26

27 ¹ Plaintiff also argues that the requests for admission were improper because they
 28 addressed ultimate legal conclusions rather than facts. (MSJ Response at 8–9.) Thus, even
 absent withdrawal, Plaintiff contends that her deemed admissions should be disregarded.
 Because the withdrawal analysis is dispositive, the Court does not reach this argument.

1 comply with the Court’s discovery procedure because she does not view her Motion to
 2 Withdraw as a discovery motion. (Admissions Reply at 2.)

3 Defendant’s procedural argument is devoid of merit and smacks of gamesmanship.
 4 As Defendant itself points out, fact discovery has already closed. Although Plaintiff’s
 5 failure to issue a timely response occurred before the close of fact discovery, Defendant
 6 did not notify her of her dereliction until after fact discovery had closed. Thus, under
 7 Defendant’s theory, if a party requests admissions shortly before the close of discovery,
 8 and the other party fails to respond, then that party is procedurally barred from even
 9 attempting to rectify its failure, never mind the existence of a provision in the Federal Rules
 10 of Civil Procedure expressly permitting just such an attempt at rectification. To the extent
 11 that Defendant reads the Court’s scheduling order as a vitiation of Rule 36(b), the Court
 12 clarifies hereby that its scheduling order has no such effect. The Court is also unconvinced
 13 by Defendant’s framing of Plaintiff’s Motion as a “discovery motion.” Defendant chose to
 14 file a dispositive motion relying in large part on the deemed admissions. Given that
 15 Defendant is seeking to use the deemed admissions to completely dispose of Plaintiff’s
 16 claims, Plaintiff’s Motion hardly reflects a garden-variety discovery dispute. Defendant is
 17 attempting to use a Kafkaesque interpretation of the Court’s scheduling order to preclude
 18 any analysis on the merits. That runs contrary to the purpose of Rule 36 and of the litigation
 19 process in general. Litigation is not a game, and this sort of gamesmanship is unbecoming
 20 of Defendant’s counsel. The Court will not deny Plaintiff’s Motion as an improper
 21 discovery motion and will instead assess it according to the Rule 36(b) framework.

22 “The first half of the test in Rule 36(b) is satisfied when upholding the admissions
 23 would practically eliminate any presentation of the merits of the case.” *Conlon*, 474 F.3d
 24 at 622 (quoting *Hadley v. United States*, 45 F.3d 1345, 1348 (9th Cir. 1995)). Many of the
 25 deemed admissions are completely dispositive of Plaintiff’s claims. For instance, the third,
 26 fifth, twelfth, thirteenth, fourteenth, and fifteenth admissions are, respectively: “[t]here was
 27 no defect in [Mr. Vizcarra’s truck] that caused the [collision] to occur”; “[t]he [truck] was
 28 not stopped on the roadway because of a defect that existed at the time it left the control of

[Defendant]”; “[t]he [truck] was not defective in design”; “[t]he [truck] did not have any manufacturing defects that caused the damages claimed in this action”; “[t]he design of the [truck] was not the cause of the [collision]”; and “[t]here was no defect in the manufacture of the [truck] that caused the [collision] to occur.” (MSJ at 4.) These admissions go to the very core of Plaintiff’s claims. Defendant’s arguments to the contrary are (1) that Plaintiff will ultimately lose anyway due to a lack of evidence showing a defect and (2) that some of the fifteen admissions were later proven true by other evidence, such as the fact that Shamrock did not undertake any repairs on Mr. Vizcarra’s truck before returning it to service. (Admissions Response at 3–5.) The former argument is entirely irrelevant, and the latter argument reveals a fundamental misunderstanding of the function of a request for admission. Even if the Court grants Plaintiff’s Motion and permits her to replace her prior non-response with her subsequent denial of all fifteen requests for admissions, those denials will be of no moment if the denied subject matter is later proven by other means. Indeed, the deemed admissions are *only* relevant insofar as they remain unproven by other evidence. Therefore, the Court’s disposition of Plaintiff’s Motion will have no effect on the adjudication of the facts surrounding the repairs to Mr. Vizcarra’s truck.

The second element of the Rule 36(b) test is also met here. In order to show prejudice, Defendant must demonstrate that it faces an undue difficulty in proving the deemed admissions by other means, such as the unavailability of a key witness or the sudden need to obtain additional evidence. *Conlon*, 474 F.3d at 622. “The prejudice contemplated by Rule 36(b) is not simply that the party who obtained the admission will now have to convince the factfinder of its truth.” *Id.* (internal quotation mark omitted) (quoting *Hadley*, 45 F.3d at 1348). Moreover, the analysis “focus[es] on the prejudice that the nonmoving party would suffer *at trial*.” *Id.* at 623–24. “[R]eliance on a deemed admission in preparing a summary judgment motion does not constitute prejudice.” *Id.* at 624. Defendant fails to carry its burden here. Defendant argues that it will be prejudiced because it will be unable to conduct additional discovery, unable to file a second motion for summary judgment incorporating that new discovery, and may incur additional expense

1 should it have to file a second motion for summary judgment. (Admissions Response at 5–
 2 7.) These arguments are unavailing. As the Ninth Circuit has expressly recognized, a
 3 district court may reopen discovery after granting a Rule 36(b) motion to withdraw
 4 admissions. *Conlon*, 474 F.3d at 624. The same is true of permitting a second motion for
 5 summary judgment. And the Court could engage in partial fee-shifting if Defendant were
 6 to actually file such a motion. As the Ninth Circuit has made abundantly clear, “prejudice
 7 must relate to the difficulty a party may face in proving its case *at trial.*” *Id.* (emphasis
 8 added). Defendant’s disregard for this unequivocal holding is concerning.

9 Defendant next argues that, even if the Rule 36(b) test is satisfied, the Court should
 10 nevertheless exercise its discretion to deny Plaintiff’s Motion. The Court disagrees.
 11 Plaintiff clearly acted with good faith. Although she blew the initial deadline, she served a
 12 response only one day after Defendant notified her of the ongoing pendency of its requests.
 13 “Good cause to avoid dismissal may be demonstrated by establishing, at minimum,
 14 excusable neglect.” *Lemoge v. United States*, 587 F.3d 1188, 1198 n.3 (9th Cir. 2009).
 15 Although Plaintiff’s admissions would not result in dismissal *per se*, they would result in
 16 the practical equivalent of dismissal, given that the admissions go to the existence of a
 17 product defect in a products liability case. Therefore, the Court concludes that good cause
 18 exists to permit withdrawal. Both of the Rule 36(b) factors overwhelmingly favor
 19 withdrawal, and “[a]lthough the rule itself is permissive, the Advisory Committee clearly
 20 intended the two factors set forth in Rule 36(b) to be central to the analysis.” *Conlon*, 474
 21 F.3d at 625. The Court perceives no need to consider any additional “other matters.” *See id.*
 22 Defendant’s contention that Plaintiff waited impermissibly long to file her Motion is
 23 without merit, as Plaintiff apparently did not know that Defendant would refuse to credit
 24 her late responses until Defendant filed its MSJ. Plaintiff raised the substance of this
 25 Motion in her Response (MSJ Response at 9), which Plaintiff timely filed after the Court
 26 granted an extension of time. (Doc. 92). In the absence of any compelling reason to deny
 27 Plaintiff’s Motion to Withdraw Admissions, the Court grants it.² The Court will disregard

28 ² Defendant has requested that the Court issue it an award of fees even in the event
 29 that Plaintiff prevails on the Motion. (Admissions Response at 14.) Other than vague

1 the deemed admissions in its consideration of Defendant's MSJ, and Plaintiff's late-served
 2 response shall constitute the controlling response to the relevant requests for admissions.

3 **III. Motion for Summary Judgment**

4 **A. Legal Standard**

5 Under Federal Rule of Civil Procedure 56(a), summary judgment is appropriate
 6 when the movant shows that there is no genuine dispute as to any material fact and that the
 7 movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56(a); *Celotex Corp. v.*
 8 *Catrett*, 477 U.S. 317, 322–23 (1986). “A fact is ‘material’ only if it might affect the
 9 outcome of the case, and a dispute is ‘genuine’ only if a reasonable trier of fact could
 10 resolve the issue in the non-movant’s favor.” *Fresno Motors, LLC v. Mercedes Benz USA,*
 11 *LLC*, 771 F.3d 1119, 1125 (9th Cir. 2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
 12 242, 248 (1986)). The court must view the evidence in the light most favorable to the
 13 nonmoving party and draw all reasonable inferences in the nonmoving party’s favor.
 14 *Torres v. City of Madera*, 648 F.3d 1119, 1123 (9th Cir. 2011).

15 The moving party “bears the initial responsibility of informing the district court of
 16 the basis for its motion, and identifying those portions of [the record] . . . which it believes
 17 demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 232.
 18 When the moving party does not bear the ultimate burden of proof, it “must either produce
 19 evidence negating an essential element of the nonmoving party’s claim or defense or show
 20 that the nonmoving party does not have enough evidence of an essential element to carry

21 statements of sweeping scope, Defendant has not explained why it is entitled to an award
 22 of fees. As Defendant itself concedes, many of the deemed admissions have already been
 23 proven by other evidence. And the deemed admissions that have not been proven by other
 24 evidence relate to the literal elements of Plaintiff’s claims, which have of course informed
 25 the scope of all discovery in this case. As far as the Court can tell, the only expenses
 26 incurred by Defendant in connection with Plaintiff’s Motion are the fees charged by
 27 Defendant’s counsel for their unduly obstinate objection to the Motion. The arguments
 28 presented by Defendant’s counsel in resisting the Motion have been largely meritless.
 Moreover, the position advocated by Defendant’s counsel mirrors, almost exactly, a
 position that the same *pro hac vice* counsel representing the same client advanced in a sister
 court last year. See *Snelson v. Daimler Trucks N. Am. LLC*, No. 22-CV-551-BAS-DDL,
 2023 WL 3186293 (S.D. Cal. May 1, 2023). It’s one thing to play hardball, but it’s another
 thing to play the precise form of hardball already rejected by a district court in this Circuit.
 The Court will not issue either party an award of fees here, but if it were inclined to issue
 an award, Plaintiff would be the likely recipient, as it appears that Defendant’s tactics
 regarding Plaintiff’s Motion border upon bad faith.

1 its ultimate burden of persuasion at trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos.*,
 2 210 F.3d 1099, 1102 (9th Cir. 2000). If the moving party carries this initial burden of
 3 production, the nonmoving party must produce evidence to support its claim or defense.
 4 *Id.* at 1103. Summary judgment is appropriate against a party that “fails to make a showing
 5 sufficient to establish the existence of an element essential to that party’s case, and on
 6 which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

7 In considering a motion for summary judgment, the court must regard as true the
 8 non-moving party’s evidence, as long as it is supported by affidavits or other evidentiary
 9 material. *Anderson*, 477 U.S. at 255. However, the non-moving party may not merely rest
 10 on its pleadings; it must produce some significant probative evidence tending to contradict
 11 the moving party’s allegations, thereby creating a material question of fact. *Id.* at 256–57
 12 (holding that the plaintiff must present affirmative evidence in order to defeat a properly
 13 supported motion for summary judgment); *see also Taylor v. List*, 880 F.2d 1040, 1045
 14 (9th Cir. 1989) (“A summary judgment motion cannot be defeated by relying solely on
 15 conclusory allegations unsupported by factual data.” (citation omitted)).

16 **B. Analysis**

17 **1. Strict Liability**

18 “Although the doctrine of strict liability in tort imposes liability without proof of
 19 negligence, the law does not impose liability for every injury caused by a product. Liability
 20 exists only if the product was in a ‘defective condition unreasonably dangerous.’” *Dart v.*
 21 *Wiebe Mfg., Inc.*, 147 Ariz. 242, 244 (1985) (quoting Restatement (Second) of Torts §
 22 402A (1965)). In order to establish a *prima facie* case of strict product liability, Plaintiff
 23 must demonstrate “that the product was in a defective condition that made it unreasonably
 24 dangerous, that the defective condition existed when the product left the defendant’s
 25 control, and that the defective condition proximately caused the plaintiff’s injuries.” *Dillon*
 26 *v. Zeneca Corp.*, 202 Ariz. 167, 172 ¶ 14 (Ct. App. 2002). A product may be unreasonably
 27 dangerous via one of three ways: “a manufacturing defect, a design defect, or an
 28 informational defect encompassing its instructions and warnings.” *Id.* Here, Plaintiff

1 alleges both a manufacturing defect and a design defect, but not an informational defect.
 2 (See Doc. 1 at 10.) Although manufacturing defects and design defects are often analyzed
 3 according to two different tests, Defendant's MSJ does not meaningfully engage with the
 4 nuances of either test.³ Instead, the MSJ rests upon the more elementary proposition that
 5 Plaintiff has not adduced sufficient evidence to demonstrate the existence of any kind of a
 6 defect, whether a manufacturing defect or a design defect.

7 Defendant does not dispute Mr. Vizcarra's testimony that his truck inexplicably lost
 8 power. (MSJ at 7.) Rather, Defendant argues that the mere fact of the vehicle allegedly
 9 slowing down does not establish that it slowed down due to a defect in the truck's design
 10 or manufacture, particularly given that it had already been on the road for 121,000 miles
 11 prior to the incident. (MSJ at 7–10.) Defendant is correct that Plaintiff does not identify
 12 any specific defect with respect to Mr. Vizcarra's truck. Plaintiff merely points to the fact

13 ³ The two tests that Arizona courts utilize to assess whether a manufacturing or
 14 design defect exists are the consumer expectation test and the risk/benefit test. See *Golonka*
 15 v. *Gen. Motors Corp.*, 204 Ariz. 575, 581 ¶ 13 (Ct. App. 2003). The main difference
 16 between the two tests is the relative role played by consumer expectations, which tend to
 17 be more well-formed in manufacturing defect cases, in which consumers frequently have
 18 experience using non-defective versions of the same product, than in design defect cases,
 19 in which consumers often lack an understanding of how safe the product could have been
 20 under alternative designs. *Id.* ¶¶ 14–15. Although there are occasionally design defect cases
 21 involving products that are so common that consumer expectations exist regarding the
 22 product's design, *see, e.g.*, *Brethauer v. Gen. Motors Corp.*, 221 Ariz. 192, 199–200 ¶¶
 23 25–28 (Ct. App. 2009), in most design defect cases the risk/benefit test is the appropriate
 24 standard, *see Boy v. I.T.T. Grinnell Corp.*, 150 Ariz. 526, 536 (Ct. App. 1986).

25 Defendant contends that the consumer expectation test is inapplicable to Plaintiff's
 26 design defect claim because Mr. Soto was a bystander. (MSJ at 8–9.) This argument is both
 27 insignificant and meritless. First, neither party grapples with the substance of either test, so
 28 it is unclear why it matters which test the Court employs, at least insofar as the instant
 Order is concerned. Second, the Court already held that the consumer expectation test is
 applicable to Plaintiff's design defect claim. (Doc. 35 at 9.) The Court recognized that
 Arizona law is not clear on whether a bystander can invoke the consumer expectation test
 for a design defect claim, but after canvassing the caselaw, the Court concluded that
 Arizona law permits a bystander to utilize the consumer expectation test in instances where,
 as here, the allegedly defective product was being used by a non-bystander and was subject
 to an ordinary expectation of safety. In so holding, the Court referred extensively to
Gomulka v. Yavapai Mach. & Auto Parts, Inc., 155 Ariz. 239, (Ct. App. 1987). (Doc. 35
 at 7–9.) Because the Court's analysis involved a close call at the dismissal stage, the Court
 would have been amenable to a possible reconsideration of this esoteric point of law at the
 summary judgment stage. Defendant, however, merely repeats the same argument that the
 Court already disposed of on the merits. Citing exclusively to *Gomulka*, Defendant
 contends that Mr. Soto "is a bystander—not a user. Therefore, the consumer expectation
 theory is inapplicable." (MSJ at 9.) In the absence of any reason to revisit its prior holding,
 the Court reiterates that the consumer expectation test applies to Plaintiff's design defect
 claim, as well as to her manufacturing defect claim.

1 that the truck lost power and claims that that occurrence alone permits the “inference” that
2 the truck was affected by a manufacturing or design defect. (See MSJ Response at 14–15.)
3 Thus, Plaintiff attempts to prove her strict liability claim using circumstantial evidence.

4 Plaintiff’s evidence is insufficient to withstand Defendant’s MSJ. Circumstantial
5 evidence of a product defect is less probative when the product is older and has a history
6 of extensive usage. For instance, in both of the two cases relied upon by Plaintiff for the
7 validity of circumstantial evidence in the product defect context, the product at issue had a
8 very limited usage history. *See Dietz v. Waller*, 141 Ariz. 107, 111 (1984) (examining a
9 boat that “had seen only approximately ten hours of use”); *Mineer v. Atlas Tire Co.*, 167
10 Ariz. 315, 316 (Ct. App. 1990) (examining a tire that was “brand new”). Although the
11 specific facts and circumstances of a case may permit a plaintiff to use circumstantial
12 evidence to prove the existence of a defect in an older product, *see Allstate Ins. Co. v. Ford*
13 *Motor Co.*, No. CV-08-2276-PHX-NVW, 2010 WL 1654145, at *18 (D. Ariz. Apr. 21,
14 2010), Plaintiff has not pointed to anything unique about this case that might permit a fact-
15 finder to infer that a product defect existed at time of manufacture/design solely by virtue
16 of the fact that Mr. Vizcarra’s truck lost power after 121,000 miles of driving. The Court
17 views this case as more similar to *Lockhart v. Techtronic Indus. N. Am. Inc.*, No. CV-20-
18 00938-PHX-JJT, 2023 WL 3440441 (D. Ariz. May 12, 2023), *aff’d*, No. 23-15872, 2024
19 WL 1427014 (9th Cir. Apr. 3, 2024). In *Lockhart*, the Court held that “[b]ecause Plaintiff
20 has provided no evidence from which a reasonable jury could conclude that, considering
21 the years and conditions of its prior use, the leaf blower’s fan guard failed as a result of a
22 manufacturing defect, Defendants are entitled to summary judgment on Plaintiff’s
23 manufacturing defect claims.” *Id.* at *6. Here, because Mr. Vizcarra’s truck was driven
24 121,000 miles prior to the accident and 80,000 miles following the accident, all without
25 incident, the mere fact of the alleged slowing does not permit a reasonable inference that
26 the truck was defectively manufactured or designed. Plaintiff’s circumstantial evidence
27 lacks probative value. And because Plaintiff has not pointed to a distinct design flaw or
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1 meaningfully addressed the risk/benefit test, the same conclusion applies to the design
2 defect claim.

3 Even if Plaintiff's circumstantial evidence could support an inference of strict
4 liability in this case, Plaintiff would still face the more straightforward obstacle of the
5 evidence's inadmissibility. "In Arizona, courts limit reliance on circumstantial evidence to
6 prove a defect to situations where the product in question is unavailable or otherwise
7 incapable of inspection." *Peralta v. Worthington Indus. Inc.*, No. CV-17-03195-PHX-JJT,
8 2022 WL 124760, at *5 (D. Ariz. Jan. 13, 2022), *aff'd*, No. 22-15140, 2024 WL 287774
9 (9th Cir. Jan. 25, 2024). Plaintiff does not dispute that Mr. Vizcarra's truck was both
10 available for inspection and actually inspected following the accident. Plaintiff therefore
11 cannot rely on circumstantial evidence regarding the truck's alleged defects.

12 In an attempt to get around this evidentiary bar, Plaintiff has submitted two expert
13 opinions that Mr. Vizcarra's truck was marred by a defect in the computer system
14 controlling the truck's gear-shift mechanism. (MSJ Response at 15–16.) Both expert
15 opinions are based entirely on circumstantial evidence, namely the fact of the alleged loss
16 of power coupled with the absence of any evidence indicating a mechanical failure. One
17 expert states that his assessment of a computer defect is based on nothing more than the
18 "process of elimination," and the other expert identifies the computer defect as an
19 "unknown transmission/clutch electronic-control failure." (MSJ Response at 15–16.)
20 Neither expert provided any opinion whatsoever as to the nature of this alleged computer
21 defect. Thus, Plaintiff's two experts base their opinions on the same circumstantial
22 evidence that Plaintiff attempted to use to permit the inference of a product defect. That is
23 impermissible. Experts, too, are limited in their reliance upon circumstantial evidence to
24 situations in which the relevant product has been destroyed or is otherwise unavailable. *See*
25 *Cross v. Empressive Candles LLC*, No. CV-20-00423-TUC-RM (MSA), 2022 WL
26 2437765, at *4 (D. Ariz. July 5, 2022), *report and recommendation adopted*, No. CV-20-

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1 00423-TUC-RM (MSA), 2022 WL 3027996 (D. Ariz. Aug. 1, 2022). Therefore, Plaintiff's
 2 expert testimony is no more admissible than the circumstantial evidence undergirding it.⁴

3 Because the evidence submitted by Plaintiff is both non-probative and inadmissible,
 4 Plaintiff has failed to create a genuine dispute of material fact. Plaintiff cannot show that
 5 Mr. Vizcarra's truck was defective, whether in manufacture or design, at the time it left
 6 Defendant's control. Therefore, Defendant is entitled to judgment as a matter of law on
 7 Plaintiff's claim of strict products liability.

8 **2. Negligence**

9 Defendant cites *Golonka* for the proposition that "if plaintiff cannot prove his design
 10 defect case in strict liability he cannot prove it in negligence because negligence claim [sic]
 11 required him to prove elements of strict liability theory plus that defendant knew or should
 12 have known product unreasonably dangerous [sic]." 204 Ariz. at 583 ¶ 22 (citing *Gomulka*,
 13 155 Ariz. at 243); (MSJ at 11). Although that statement from *Golonka* was predicated in
 14 part upon an application of the risk/benefit test, it nevertheless applies here because
 15 Plaintiff has adduced no competent evidence of a defect. Without a *prima facie* showing
 16 that Defendant's product was unreasonably dangerous, there cannot possibly be liability
 17 under Plaintiff's theories of negligence or wrongful death. Moreover, in responding to
 18 Defendant's MSJ, Plaintiff did not devote a word to defending her claims of negligence
 19 and wrongful death. Although the Court would not deem such an omission to be a
 20 concession if Plaintiff's claims appeared to be viable, here the claims are not viable.
 21 Defendant is therefore entitled to judgment as a matter of law on all of Plaintiff's claims.

22 **C. Conclusion**

23 Plaintiff's final argument is that Defendant's non-cooperation at a July 12
 24 deposition precludes the Court from entering summary judgment in Defendant's favor.
 25 Upon cursory review, this argument lacks merit. In any event, because Plaintiff failed to

26 ⁴ In attacking Plaintiff's computer-failure theory as speculative and conjectural,
 27 Defendant offers an equally speculative theory that Mr. Vizcarra's truck slowed down due
 28 to an unknown defect in the trailers attached to it. (MSJ at 7–12.) In rejecting Plaintiff's
 evidence as insufficient, the Court by no means credits Defendant's unsubstantiated
 hypothesis.

1 comply with the discovery-dispute procedures set forth in the Court's scheduling order,
2 (see Doc. 37 at 3), the Court will not entertain Plaintiff's argument.

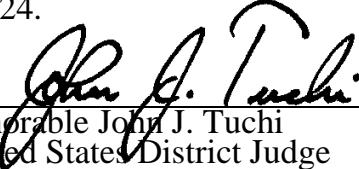
3 **IT IS THEREFORE ORDERED** granting Plaintiff's Motion to Withdraw
4 Admissions. (Doc. 104.)

5 **IT IS FURTHER ORDERED** granting Defendant's Motion for Summary
6 Judgment. (Doc. 86.)

7 **IT IS FURTHER ORDERED** that each party shall bear its costs and fees with
8 respect to both Motions.

9 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment in
10 favor of Defendant Daimler Truck North America LLC and terminate its involvement in
11 this matter. The case remains open as to Plaintiff's claims against the other defendants.

12 Dated this 22nd day of October, 2024.

13 
14 Honorable John J. Tuchi
United States District Judge

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